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IN THE

Supreme Court of the United States

October Term, 1984

LOUIS HEIMBACH, as County Executive of Orange County on behalf of himself and all those similarly situated in the Metropolitan Transportation District of the State of New York,

Petitioner,

against

RODERICK CHU, as Commissioner of New York State Department of Taxation and Finance, and WARREN ANDERSON, as Temporary President of the New York State Senate,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: December 4, 1984

Questions Presented.

1. Under the principles of republicanism guaranteed to the States by Article IV, Section 4, and the principles of Due Process and Equal Protection, is there a minimal requirement, that state laws be passed by a majority vote of the elected Legislators in actual presence in the Chamber at the time the question is voted?

2. Do the New York prinicples of *res judicata* preclude review of the primary question when it might have been raised in a prior action* between the parties having transactional identity, with this action, but in which the first court would have been precluded from inquiring because of Section 40 of the New York Legislative Law and a discretionary declination of jurisdiction?

3. Does the Tax Injunction Act (28 U.S.C. 1341) bar inquiry into the primary question when the issue involves the method of adoption of a State taxing act as opposed to its resultant effect upon the taxpayer, and in a related context, does that Act bar inquiry into the question when the ability to pursue it in the state court is doubtful at best?

Parties Below.

The caption of the case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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*_Heimbach v. State of New York_, 113 Misc. 2d 189, rev. 89 A.D. 2d 138, aff'd. 59 N.Y. 2d 891, app. dism., 104 S.Ct. 386.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984.

LOUIS HEIMBACH, as County Executive of Orange County on behalf of himself and all those similarly situated in the Metropolitan Transportation District of the State of New York,

Petitioner,

against

RODERICK CHU, as Commissioner of New York State Department of Taxation and Finance, and WARREN ANDERSON, as Temporary President of the New York State Senate,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

OPINIONS BELOW.

The District Court's Memorandum Opinion and Order dismissing the complaint in this action is not reported. It was rendered by Judge Sweet of the United States District Court for the Southern District of New York on December 23, 1983 and is set forth in full in the appendix at page 1a.

The opinion of the United States Court of Appeals for the Second Circuit, affirming the District Court is reported at 744 F.2d 11 and is set forth in full in the appendix at page 20a.

The final opinion of the New York State Court of Appeals in *Heimbach v. State* a related case and one relied upon by the United States Court of Appeals for the Second Circuit is reported at 59 N.Y.2d 891 and is set forth in the appendix at page 32a.

Jurisdiction.

On September 17, 1984 the United States Court of Appeals for the Second Circuit rendered the judgment which petitioner seeks to have reviewed. The jurisdiction of this Court is invoked, pursuant to 28 U.S.C. 1254 (1).

Constitutional and Statutory Provisions.

United States Constitution, Article IV, Section 4 (Appendix p. 33a).

United States Constitution, Fourteenth Amendment, Equal Protection and Due Process Clauses (Appendix p. 33a).

New York State Constitution, Article III, Section 14 (Appendix p. 33a).

New York State Legislative Law, Section 40 (Appendix p. 35a).

New York State Senate Rule VIII, Section 6 (Appendix p. 35a).

New York State Senate Rule IX, Section 1(a) (Appendix p. 36a).

Statement of the Case.

Plaintiff Louis Heimbach ("Heimbach") is a resident and taxpayer in the Metropolitan Commuter Transportation District, a special tax district encompassing the New York City Metropolitan Area.* He is also the County Executive of Orange County (N.Y.) and its chief elected official. His complaint, under the authority of 42 U.S.C. 1983 and 28 U.S.C. 1343(3), asked the District Court for declaratory and injunctive relief based upon allegations that the New York State Senate's procedure for adoption of bills known as the "fast roll call", as used in enacting a sales and use tax in this district served by the New York Metropolitan Transportation Authority, violated the Guarantee Clause of Article IV, Section 4 of the Constitution and denied him equal protection and due process of law.

Rule VIII, Section 6 of the New York Senate's Rules of Procedure provides for the passage of bills in the Senate, a 60 member body, by "a roll call . . . of five Senators, two of whom shall be the Temporary President and Minority Leader, provided however, that each Senator's name shall be called if requested by five Senators." According to Senate custom (not formal rule), each Senator who is not actually called in the fast roll call is deemed to have voted in favor of the bill unless he voices opposition to it or is considered absent at the time of the vote. Under the same custom physical absence from the Senate chamber, however, will not prevent a Senator from being considered "present" for purposes of the fast roll call, as opposed to the traditional name by name "long roll call", if he was in attendance prior to the call (no matter how far removed in time) but had not asked the Secretary of the Senate to be excused. In 1981, virtually all of the bills passed (97.9%) were passed by fast roll call.**

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*Section 1262, New York Public Authorities Law.

**_Heimbach v. State of New York_, 89 A.D. 2d 138, 143 (1982).

On July 8, 1981, the last day of the 1981 session, Senator Howard Nolan participated in Senate proceedings until late in the afternoon. Senator Manfred Ohrenstein, the Minority Leader, telephoned Senator Nolan after he left to tell him that the Senate was going to consider a multi bill financing package for the Metropolitan Transportation Authority later that evening. Senator Nolan told Senator Ohrenstein that he opposed the package but that he would not be returning to the Senate chambers because he was scheduled to undergo surgery the following morning. There is a dispute as to whether Senator Nolan asked Senator Ohrenstein to arrange to have him excused from the proceedings. In any event, this was not done. Senator Nolan was in the hospital when the Senate, by fast roll call, between the hours of 3:00 and 4:00 A.M. on July 9, 1981, passed the bill now being challenged, Assembly No. 9059, 1981 N.Y. Laws ch. 485, codified at N.Y. Tax Law Section 1109. The bill received 31 affirmative votes, the minimum needed for passage, and Senator Nolan was counted as present and favoring the bill.

Immediately before and after the Senate voted on Section 1109, it took up and voted on Assembly No. 9058 and Assembly No. 9060 as part of the Metropolitan Transportation Authority finance package by means of the traditional name by name long roll call. On each vote, both before and after the questioned vote, Senator Nolan was correctly noted by the Secretary as being absent and not voting.*

On September 17, 1981, Heimbach and others brought an action in New York Supreme Court, alleging that section 1109 violated the equal protection rights of taxpayers in Orange and Suffolk Counties and that it had not been

*This undenied anomaly is not discussed by the Court of Appeals but is correctly noted by the District Court.

duly enacted as required by the New York Constitution because Senator Nolan opposed the bill and his vote should not have been counted in favor of it. That court, without considering the equal protection claim, declared the statute invalid because it had not received the "assent of a majority of the members elected to each branch of the legislature" as required by Article III, Section 14, of the New York State Constitution. *Heimbach v. State of New York*, 113 Misc. 2d 189 (1982). The Appellate Division, Second Department, reversed (89 A.D.2d 138) finding the issue to be essentially one involving the "internal affairs" of a coordinate branch of government into which it would not intervene. The New York Court of Appeals (59 N.Y.2d 891) affirmed, citing New York Legislative Law Section 40 as authority for the proposition that the presiding officer's certificate to the questioned bill showing the date of adoption and the requisite number of votes for passage was "conclusive evidence" that the bill was validly enacted. That court also refused to inquire because of its respect for the basic polity of separation of powers and "the proper exercise of judicial restraint". This Court refused to review the collateral equal protection issue dismissing that appeal at 104 S. Ct. 386.

Heimbach then sought a District Court judgment in this action declaring that the fast roll call when combined with the New York State Senate custom which presumes the presence of and affirmative votes of all Senators, violates the Guarantee Clause of the United States Constitution. He also asked that the District Court invalidate Section 1109 on the grounds that the manner in which it passed violated the Due Process Clause in that it was adopted in violation of a process of law which was his due, explicitly and completely expressed in the New York State Constitution (Article III, Section 14) read together with New York State Senate Rule No. IX, Section 1 requiring every Senator to be present "within the Senate Chamber" and

requiring that every Senator "shall" vote on each question asked".

Heimbach also alleged that the fast roll call violated the Equal Protection Clause in that it allows law to be enacted by a small minority of the representative assembly amounting to an arbitrary disenfrancisement of the constituent voters including himself which elect the assembly in the first place for purposes of enacting laws binding upon them.

The District Court did not reach the merits finding that the provisions of the Tax Injunction Act (28 U.S.C. 1341) prevented it from so doing because there was available to Heimbach an adequate state court procedure and forum to which he could present the question and have it adjudicated. The District Court also found Heimbach's standing to maintain the action as too abstract. It dismissed his complaint. The Court of Appeals affirmed and in so doing reasoned that the recent teachings of this Court,* combined with the transactional identity approach to *res judicata* in New York, precluded Heimbach from presenting the primary question in this action since it could have been presented in the first State Court action. The Court of Appeals also ruled that the provisions of the Tax Injunction Act did apply to Heimbach's complaint that the method by which Section 1109 was enacted was unconstitutional notwithstanding the thinking of the Third Circuit in *Parker v. Merlino,* 646 F. 2d 848, 852-53 nt. 11, a case specifically holding that the Act did not apply to a complaint directing itself at the manner in which a Tax Act was enacted as opposed to its resultant effect upon the taxpayer. The Court of Appeals also agreed with the District Court's observation concerning the abstract standing of Heimbach to bring the complaint at all.

Migra v. Warren City School District Board of Education, 104 S. Ct. 892.

Heimbach now petitions this court for review.

REASONS FOR GRANTING THE WRIT.

I.

The arguments framed by this action are deep and important. They go to the very center of the notions of a Republican Form of Government, a government by a majority vote of elected representatives gathered for the purposes of enacting laws that bind the common whole.* The fast roll call in New York, under which only five of sixty elected Senators need actually be present and vote in the Chamber at the time the question is put, subverts the notions of republicanism. It is a process that dilutes the representative voice of the People at the legislative assembly and tears at the fabric of their liberty. This process, so vastly used in New York, is contrary to the essence of republicanism as it is understood by the people of this Nation and as it was understood by the founding fathers**

There is need for this Court to seize this issue and to decree whether there is a requirement within the notions of a republican form of government that state laws be passed by a Legislative body, at least by a vote of a majority of those in actual presence at the time the question is put. This is a concept so simple and so readily accepted by the People of this Nation that the notion of a procedure allowing anything less is virtual anathema.

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*Cf. Hamilton commenting in *Federalist* No. 10 that if "faction consist of less than a majority, relief is supplied by the *republican principal*, which enables the majority to defeat its sinister views by regular vote." (emphasis supplied)

**The District Court correctly observed, and the Court of Appeals did not disagree, that after *Baker v. Carr*, 369 U.S. 186, the Federal courts have authority to restructure State government when necessary to vindicate individual rights and rejected the notion that all claims under the Guarantee Clause are non-justiciable as "political questions". See also Tribe, *American Constitutional Law*, 1978 Ed., Section 3-16, n.1.

In this particular case the issue is underscored by Senator Nolan's undenied hospitalization and complete absence from the Chamber which resulted in his being marked not present and not voting on legislation taken up and voted on by the traditional name by name long roll call immediately before and after the vote on Section 1109 upon which he was marked present and voting aye by the same Secretary of the Senate simply because of the fast roll call and the need for his vote to insure passage.

This Court should pierce the devices that were employed by the Courts below to avoid dealing with the real issue. It should grasp at the true question once and for all. It is important to the People of this Nation. It is important to the continued confidence of these great masses who elect representatives to the numerous legislative assemblies that make up the very foundation blocks of this Nation and who think that they are governed by the commonly accepted notion of "majority vote".

II.

The issue of the applicability of the "Tax Injunction Act" (28 U.S.C. 1341) to a complaint such as this is now in true conflict between the circuits. The complaint before the District Court in this action is an attack on the method by which a taxing act was born. As such, it has been held by the Third Circuit (*Parker v. Merlino,* 493 F. Sup. 381, 386, aff'd 646 F. 2d 848, 852-53 n. 11) that the Tax Injunction Act did not apply because the primary challenge of the litigation is to the legislative procedure rather then to the resultant tax. The Second Circuit in this case rejected the thinking of the *Parker* court stating that "to the extent that *Parker v. Merlino**** is to the contrary, we decline to follow its reasoning".

The thinking of the *Parker* court, it is submitted, is superior to that of the Second Circuit. The Tax Injunction Act is aimed at the application of the State Taxing Act not the method by which it (or any other piece of legislation) was given life. The purpose of the Act, born out of the principles of comity and federalism in recognition of the imperative need of a state to administer its own fiscal operations,* directs itself at the operation of the tax and not the generic legislative method by which the tax act may be enacted in the State Legislature. In any event, this court should grant review to resolve this conflict between the Circuits.

III.

The Court of Appeals committed a substantial error.

There is no doubt now that the New York rule of transactional identity on *res judicata* is applicable to an action such as this. However, even the Court of Appeals recognized that the New York rule cannot bar inquiry by a second court if the first was unable or unwilling to decide the issue because of lack of jurisdiction or the discretionary refusal to exercise its jurisdiction (*Salwen Paper Co., Profit Sharing Retirement Trust v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 72 A.D.2d 385; Restatement of Judgments, 2nd, Section 25, comment "e").

Contrary to the observations of the Court of Appeals, Section 40 of the New York Legislative Law ("Section 40") precludes a New York Court from reviewing the issue brought to the District Court in this Complaint. That issue is the efficacy of the fast roll call used by the New York State Senate to enact Section 1109 in light of the guarantee of a replublican form of government contained in Article IV, Section 4 of the Constitution. Section 40 specifically

*(*Tully v. Griffin, Inc.*, 429 U.S.68, 732.)

precludes judicial inquiry by a New York Court into the question of whether or not the bill at issue, certified as such, received the votes of "a majority of all members elected" to the State Senate. That question is at the very heart of the notions of republicanism guaranteed by the Constitution. The Court of Appeals' statement that a Section 40 Certificate does not certify that "the method of passage met the requirements of the United States Constitution" misses the point. The requirements of a majority vote by the members present at the time of vote was a tenet of the New York State Constitution (and all republican charters from ancient time)* at the adoption of the United States Constitution in 1789. As such, it is part of the republican form of government guaranteed to the People of New York State (*Minor v. Happersett,* 88 U.S. 162, 175-176; Madison, *Federalist,* No. 43). A Section 40 Certificate in this case prevents New York Courts from inquiring into the primary issue before the District Court. The language of the New York Court of Appeals in *Heimbach v. State,* 59 N.Y.2d 891-892 is absolutely clear in that regard. That Court stated unequivocally that such a certificate "precludes judicial review of the propriety of the (fast) roll call vote to effect (this) legislative action".

The New York authorities cited by the Court of Appeals (summarized in *Board of Education v. City of New York,* 41 N.Y.2d 535 at 538) do not deal with matters that are explicitly precluded from review under the language of Section 40, such as the number of Senators present and the

*See Article 61 of the Great Charter of Liberties of King John, the "Magna Carta" of 1215, establishing the committee of 25 barons charged with the duty on behalf of "the Community of the whole land" of seeing that the King and other Barons of the Kingdom observed the liberties set out in the Charter. The proviso in Article 61 (translation by Richard Thomson, "Historical Essay on the Charter of King John", London, 1829, pg. 97) is that in all things committed to them that they shall, in the absence of those summoned who could not or would not attend, be bound by the action of "the greater part of those who were present" (***quod major pars eorum, qui presentes fuerint,***).

numbers of votes cast. These cases do not properly stand for a proposition that in the face of a Section 40 Certificate judicial review may be undertaken by the courts of New York to determine whether the Legislature has complied with federal constitutional proscriptions as to legislative procedures. Indeed, the language of the New York Court of Appeals' in *Heimbach v. State,* is a direct rejection of the commentary of Judge Saypol in *Franklin National Bank v. Clark,* 26 Misc. 2d 724, 745 cited by the Court of Appeals in support of its contention that Section 40 does not bar inquiry into the constitutionality of the method by which a particular piece of legislation was passed.

Furthermore, the New York Court of Appeals clearly articulated an alternate reason for not inquiring stating at 59 N.Y. 2d 893, that it would not do so based on its "respect for the basic polity of separation of powers and the proper exercise of judicial restraint." A clearer declination of jurisdiction can not be found. In such light, the exception to the doctrine of *res judicata* set forth in comment "e" of the Section 25 of Restatement of Judgments, 2nd become strikingly applicable.

IV.

In view of Section 40 and the pronouncements of the New York Court of Appeals in *Heimbach v. State, supra,* it is simply not clear whether or not the courts of New York would inquire into the basic issue before the District Court. In view of such an ambiguity, this Court has held that the constraints of the Tax Injunction Act should not prohibit the bringing of this action in the Federal Court in that the remedy at the State Court level is speculative and thus less than "plain" (*Roswell v. LaSalle National Bank,* 450 U.S. 503, 517; *Hillsborough v. Cromwell,* 326 U.S. 620, 625). Similarly, the teachings of *Roswell* tell us that

for the prohibitions of the Tax Injunction Act to apply at all, there must be a procedure available to the plaintiff at the State level giving him "a full hearing and judicial determination" of the controversy and one at which he could "raise any and all constitutional objections to the tax", or otherwise the State remedy is not "adequate". Section 40 and the declination of jurisdiction by the New York Court of Appeals render the remedy, if any, before the courts of the State of New York available to the plaintiff to pursue the main question less than "plain" and not "adequate". The Court of Appeals was in error in not recognizing this.

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APPENDIX.

District Court's Memorandum Opinion and Order.

LOUIS HEIMBACH, Individually and as County Executive of Orange County on behalf of himself and all those similarly situated in the Metropolitan Transportation Commuter District of the State of New York,

Plaintiff,

against

RODERICK CHU, as Commissioner of New York State Department of Taxation and Finance, and WARREN ANDERSON as Temporary President of the New York State Senate,

Defendants.

83 Civ. 5318 (RWS)

Appearances:

James Sweeney, Esq., Attorney for Plaintiff, County of Orange Attorney, 255-275 Main Street, Goshen, New York 10924.

Hon. Robert Abrams, Attorney General of the State of New York, Attorney for Defendants, Two World Trade Center, New York, New York 10047 By: Melvyn R. Leventhal, Deputy First Assistant Attorney General, Richard G. Liskov, Esq., David Pollack, Assistant Attorneys General of Counsel.

SWEET, D. J.:

Defendant Roderick Chu ("Chu"), the Commissioner of the New York State Department of Taxation and Finance, has moved pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) to dismiss this action brought under 42 U.S.L.C. § 1983 by Louis Heimbach, individually and as Executive of Orange County ("Heimbach"). For the reasons stated below, the motion will be granted.

This case involves Chapter 485 of the New York Laws of 1981 ("the Act") enacted by the New York Assembly and Senate on July 8, 1981 and July 9, 1981, respectively, and signed into law by then Governor Carey on July 11, 1981. The bill was part of a comprehensive set of revenue measures designed to maintain and improve facilities in the twelve counties serviced by the Metropolitan Transportation Authority ("MTA"). As passed, the Act increased the sales and compensating use tax by one quarter of one percent in the twelve county area, including Orange County and Suffolk County.[1]

This lawsuit and the related litigation discussed below complain about the method of passage of the Act in the Senate chamber of the New York State Legislature. Senator Howard Nolan, the Democratic Senator from the 42nd District was scheduled to undergo surgery on July 9, 1981 at St. Peter's Hospital in Albany. He checked into the Senate chamber early on July 8 and participated in the Senate's activities until the dinner hour when he left the Senate office building. At approximately 7:30 p.m. that evening, Senator Manfred Ohrenstein, the Minority Leader, called Senator Nolan and informed him that the

[1]The twelve counties are Manhattan, Bronx, Brooklyn, Queens, Staten Island, Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester. The Act contemplated the generation of $86,700,000.00 in revenues, $57,910,000.00 of which was to be distributed to the New York City Transit Authority, the Manhattan and Bronx Surface Transportation Operating Authority, and the Staten Island Rapid Transit Operating Authority.

Senate would probably vote on the MTA financing package that evening and that the vote might be close. Senator Nolan informed Senator Ohrenstein of his imminent hospitalization and necessary absence from the chamber for the vote and expressed his opposition to the MTA package, a position apparently contrary to the Democratic leadership in the Senate.

There is disagreement on the events as they subsequently unfolded. Senator Nolan claims that he received the Minority Leader's assurance during the phone conversation that he would be marked excused for any votes that evening or on the next day. Senator Ohrenstein has no recollection of having given such assurance and did not in fact mark his colleague absent. Senator Nolan checked into St. Peter's Hospital at 9:00 p.m. on July 8, 1981.

Early in the morning of July 9, 1981, the Senate took up three measures which were part of the MTA tax package. The vote on Assembly No. 9058, a franchise tax on certain oil companies, was taken up by long or traditional roll call, a procedure in which the entire roll of 60 Senators is read by the Journal Clerk and a Senator must be physically present in the chamber to register his or her vote. Senator Nolan, not present in the Senate chamber, was stricken from the roll, marked absent, and not considered in the tally on the vote for Assembly No. 9058.

Between 3:00 a.m. and 4:00 a.m. that morning, the Senate proceeded to vote on Assembly No. 9059, the bill in controversy here. The vote on the bill was taken by means of a "fast roll call" outlined in Rule VIII(6) of the Senate Rules.[2] The fast roll call is taken by calling the names of

[2]Senate Rule VII(6) provides:

> The question on the final passage of every bill shall be taken immediately after the third reading and without debate. On the final passage of every bill, a roll call shall be taken by the Secretary calling the names of five Senators, two of whom shall be the Temporary President and the Minority Leader, provided however, that each Senator's name shall be called if requested by five Senators. Each roll call shall be entered on

(footnote continued on following page)

five Senators, including the Temporary President, the Minority Leader, and three others, usually the first and last two Senators on the alphabetically arranged Senate roll call list. The five Senators may request a long roll call. Otherwise, any Senator marked present during that session day, whether physically present in the chamber at the time of the vote or not, will be deemed to have voted in the affirmative unless he stated on the record or raised his hand to indicate opposition.[3] Senator Nolan, having designated his presence earlier in the session day and not having been marked excused for any vote,[4] was recorded as having voted in favor of Assembly No. 9059. The bill received 31 affirmative votes, the precise number required

(footnote continued)

> the journal. Such roll calls shall be available for public inspection upon request in the office of the Journal Clerk. When a bill does not receive the number of votes required by the Constitution to pass it, it shall be declared lost, except in cases provided for by subdivision d of section two of Rule 9 hereof.

[3]Apparently, the procedure for voting by fast roll call is derived from Senate custom rather than formal rule. *See* Affirmation of Manfred Ohrenstein, Appendix on Appeal in Appellate Division at 123-34.

[4]Senator Nolan designated himself present by checking into the Senate early on July 8. Under Senate rules and customs unless such designation had been changed he would have been recorded in the affirmative on every fast roll call and as not voting on every long roll call, as he in fact was recorded on that day. The Senate Journal indicates that Senator Nolan was recorded in the affirmative on six fast roll call votes on MTA financing bills (Senate No. 7093, Senate No. 7105A, Senate No. 7107A, Senate No. 7108, Assembly No. 9059, Assembly No. 9061) and as not voting on two long roll call votes on MTA financing bills (Assembly No. 9058, Assembly No. 9060).

Senator Nolan, of course, claims that he asked Senator Ohrenstein during their phone conversation of July 8, 1981 to convert his "present" designation in to an "excused absence." The procedure for excusing a Senator who has designated himself as present is for that Senator or another one to rise in the chamber and request such an excuse from voting on further items. Apparently this type of request is habitually accepted by the Senate majority without objection. Senator Ohrenstein does not recall being asked to make such a request on behalf of his colleague.

for majority passage,[5] and was declared adopted by the acting President of the Senate.

Thereafter, Assembly No. 9060, repealing the tax exemption granted to certain corporations engaged in foreign commerce, was voted on by long roll call vote. Senator Nolan was marked as absent and, as a consequence, his tally did not count either in favor of or as opposed to the bill.

The July 8-9, 1981 session being the last one for 1981, Senator Nolan was precluded from moving for reconsideration of the vote on Assembly No. 9059. However, on July 22, 1981, he wrote to Warren Anderson, the Majority Leader of the Senate, and informed him of the misunderstanding.

On September 3, 1981, Heimbach and Peter F. Cohalan ("Cohalan") individually and as County Executive of Suffolk County, brought a class action against New York State and its Tax Commissioner seeking a declaration that the operation and effect of the Act violated the equal protection clause of the 14th amendment and in addition sought an injunction against the enforcement of the Act. On October 7, 1981, the plaintiffs voluntarily dismissed the action.

[5]Article III § 14 of the New York Constitution provides:

> No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified, under his hand and the seal of the state, the facts which in his opinion necessitate an immediate vote thereon, in which case it must nevertheless be upon the desks of the members in final form, not necessarily printed, before its final passage; nor shall any bill be passed or become a law, except by the assent of a majority of the members elected to each branch of the legislature; and upon the last reading of a bill, no amendment thereof shall be allowed, and the question upon its final passage shall be taken immediately thereafter, and the ayes and nays entered on the journal.

On September 17, 1981, Heimbach and Cohalan filed another class action, this time in New York State Supreme Court, Orange County, alleging in three causes of action that the Act violated the equal protection clause by discriminating against the taxpayers of Orange and Suffolk Counties and that the Act was not duly enacted. They sought a declaratory judgment that the Act was unconstitutional and unlawfully enacted and an injunction against its enforcement.

By decision of March 17, 1982, Judge Green of the Supreme Court for Orange County held that the Act had "failed to become a law" because it had not received the assent of the majority of the members of the Senate as required by article III, section 14 of the New York State Constitution. *Heimbach v. State,* 113 Misc.2d 187 (N.Y.Sup.Ct. 1982).

The Appellate Division reversed the trial court in *Heimbach v. State,* 89 A.D.2d 138 (1982) (*per curiam*). The court noted that the constitutional propriety of the fast roll call rule and the fast roll call voting procedure was not before it because plaintiffs had conceded that in the context of that action they were not constitutionally impermissible. *Id.* at 148. It found that the cause of action leveled at the enactment of Assembly No. 9059 was really complaining of Senator Ohrenstein's failure to arrange to have Senator Nolan marked excused from further deliberations. In the court's judgment, this was a dispute purely internal to the legislature and beyond the reaches of judicial review. *Id.* at 149. Finally, the court granted summary judgment for the defendants on the equal protection challenge to the assessment of taxes authorized by the Act. *Id.* at 132.

On June 16, 1983, the New York Court of Appeals affirmed the decision of the Appellate Division. It did so by accepting the Appellate Division's view of the equal protection cause of action and by invoking N.Y.Legis.Law §

40 which provides that the presiding officer's certificate showing the dates and requisite votes for passage of a bill shall be "conclusive evidence" that the bill was validly enacted. Plaintiff appealed the decision to the United States Supreme Court and the Court dismissed plaintiffs' appeal for want of a substantial federal question. *Heimbach v. State of New York*, 52 U.S.L.W. 3369 (U.S. November 7, 1983).

On July 18, 1983, Heimbach, individually and as County Executive of Orange County, brought this lawsuit as a class action against James H. Tully, Jr., then Commissioner of the New York State Department of Taxation and Finance and Senator Anderson. The jurisdictional statement relies on the provisions of 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), and the complaint states three causes of action. The first cause of action is based on the guaranty clause of the United States Constitution, article IV, section 4 and prays for a declaratory judgment that New York Senate Rule VIII(6) violates that clause. The second cause of action alleges that the passage of the Act by use of the fast roll call method "amounts to a disenfranchisement of the electors of the State of New York" in violation of the equal protection clause. The third cause of action alleges that article III, section 14 of the New York State Constitution, read in conjunction with Senate Rule IX(a), creates a process which was ignored during the passage of the Act in violation of the due process clause. Plaintiff, therefore, seeks a declaratory judgment that the Act was unlawfully enacted and is without valid effect upon him and the plaintiff class. Plaintiff also requests an injunction against the enforcement of the provisions of the Act and an award of attorneys fees.

Defendant Chu has moved to dismiss the lawsuit under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) contending that the action is barred by the Tax Injunction Act, 28 U.S.C. § 1341, that the principle of comity precludes this court's

review of the declaratory judgment aspect of the complaint, that the guaranty clause cause of action is nonjusticiable, that the complaint is barred by *res judicata,* that the 11th amendment affords the defendants immunity, and that the plaintiff lacks the requisite standing to assert his claims.

Defendant's principal argument disposes of most of the complaint. The Tax Injunction Act of 1937 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341.

The statute was enacted during a period of hostility to the issuance of federal injunctions against state officials in the wake of *Ex parte Young,* 209 U.S. 123 (1908). *Perez v. Ledesma,* 401 U.S. 82, 115 (1971) (Brennan, J., concurring in part and dissenting in part). It has its roots in equity practice, in principles of federalism, and in the recognition of the hegemony of the states in the administration of their own financial operations.

> Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final, restraining collection of state taxes. These are the considerations of moment which have persuaded federal courts of equity to deny relief to the taxpayer—especially when the state, acting within its constitutional authority, has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally exacted tax.

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298 (1943).

While the Tax Injunction Act is, by its terms, applicable to federal actions for injunctive relief, there is no question that it precludes the prosecution of federal declaratory judgment actions as well. *California v. Grace Brethren Church,* 457 U.S. 393, 408 (1982) ("[B]ecause there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act."). Moreover, the application of the Tax Injunction Act is not defeated by the invocation of 42 U.S.C. § 1983 in the complaint. *Hickman v. Wujick,* 488 F.2d 875, 876 (2d Cir. 1973) (*per curiam*).

Heimbach does not challenge these propositions or their application to his lawsuit. Instead, he contends that the state remedy for his grievance is not plain, speedy and efficient and, therefore, the strictures of the Tax Injunction Act cannot oust this court of its jurisdiction. Specifically, he asserts that the New York Court of Appeals' reliance on N.Y.Legis. Law § 40 conclusively establishes that the New York courts will not provide a forum to review the method by which a law is enacted, once that law has been certified by the presiding offices as having been adopted.[6]

[6]Section 40 of the New York Legislative Law reads:

> Upon the passage by either house of the legislature of a bill, concurrent resolution proposing amendments to the state constitution, or concurrent resolution proposing or ratifying amendments to the constitution of the United States, the presiding or other officer designated by the rules of such house shall append to such bill or resolution a certificate, to be signed by him, which shall disclose the date of its passage in such house, and whether passed by the votes of a majority of all the members elected to such house or of two-thirds thereof, or of a majority of such members, three-fifths

(footnote continued on following page)

In *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981), the Supreme Court interpreted the plain, speedy and efficient state remedy language. The Court examined an Illinois procedure requiring property owners who wished to challenge the taxes assessed against them to pay the contested taxes under protest and, if successful in their challenge, to obtain a refund without interest after two years. The Court held that the disputed language required only that the state remedy meet certain procedural criteria, namely a full hearing on and judicial determination of any constitutional objections to the tax, with review available in the Supreme Court. The Illinois remedy met those criteria. *Id.* at 514; *see Grace Brethren Church, supra* at 411. The question, therefore, is whether New York affords plaintiffs like Heimbach a full hearing on, and judicial determination, of his constitutional objections to the tax.

In *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976), a Vermont corporation situated in Arlington, Vermont, six miles from the Vermont-New York border, sought to enjoin the allegedly unconstitutional assessment of New York sales taxes against sales to the firm's New York customers. The Court reached the inevitable question whether New York provided the statutorily requried remedy for plaintiff to press his constitutional claims, while preserving his right to challenge the amount of taxes due.

(footnote continued)

> thereof being present. In addition, if any such bill has been passed on a message required by the constitution, that fact also shall be stated, and if the message so specifies, the applicable portion of the constitution shall be identified. Upon the passage of a bill as to which a part becomes law immediately and a part requires further action by the governor, two copies shall be certified as above provided, one of which, upon final passage by both houses, shall be transmitted to the governor and the other to the secretary of state. No bills shall be deemed to have so passed unless certified in the manner provided by this section, which certificate to such effect shall be conclusive evidence thereof.

The Court examined the availability of declaratory relief under N.Y.Civ.Prac.Law § 3001 and its earlier summary affirmance of a three-judge district court in *Ammex Warehouse Co., Inc. v. Gallman,* 414 U.S. 802 (1973). *Id.* at 74. The district court had held that § 1341 required dismissal of an action brought by two New York companies claiming that the assessment of sales taxes against them violated the commerce and import-export clauses of the Constitution. The availability of declaratory relief from the New York State Supreme Court justified the dismissal.

The Court in *Tully* reinforced its decision in *Ammex:*

> Despite the provisions of its taxing statutes that provide that judicial review of an administrative determination shall be a taxpayer's only remedy, the New York courts have consistently held that other procedures, including an action for a declaratory judgment, may be used when the claim is that the tax is unconstitutional.

429 U.S. at 68 (citing *Slater v. Gallman,* 38 N.Y.2d 1, 4, 339 N.E.2d 863, 864 (1975) and *In re First Nat'l City Bank v. City of New York Finance Admin.,* 36 N.Y.2d 87, 92-93, 324 N.E.2d 861, 864 (1975)); *see 57th St. Management Corp. v. City of New York,* 456 F. Supp. 286, 288-89 (S.D.N.Y. 1978).

It appears, therefore, that N.Y.Civ.Prac. Law § 3001 affords Heimbach the procedural vehicle for pressing his guaranty clause, equal protection, and due process claims. Indeed, plaintiff's state court complaint involved that court's jurisdiction under § 3001 and the equal protection claims pursued therein[7] ascended to the New York Court of Appeals for a decision on the merits.

[7]The equal protection claims in the two lawsuits, while not models of clarity, appear to draw from distinct strands of equal protection analysis. The state claim alleges a geographical distinction in

(footnote continued on following page)

Even if this court were to accept the premise that the dismissal of a claim as nonjusticiable is tantamount to the absence of a state court remedy, a point discussed below, plaintiff has not shown that the Court of Appeals citation of N.Y.Leg.Law § 40 translates into an automatic dismissal of his claims by the state courts as nonjusticiable. The parties have submitted the briefs filed at all three levels of the state court proceeding, and the court cannot locate any claim even reminiscent of the constitutional claims raised here. Heimbach did not argue in state court the claims he urges in this forum, and the court is reluctant to read into the state court decisions a distaste for claims not presented to them. *See 28 East Jackson Enters., Inc. v. Cullerton,* 551 F.2d 1093, 1095-96 (7th Cir. 1977), *cert. denied,* 434 U.S. 835 (1977) (court could not say that state remedy for federal claims was unavailable where state court's refusal to consider the merits was due to plaintiff's own refusal to present the dispositive federal claims in the state court).

Judging from the opinions written by the Appellate Division and the Court of Appeals, those courts viewed the controversy on the mode of enactment as a very limited one, specifically whether Senator Ohrenstein violated Senate rules and customs by failing to mark Senator Nolan excused from the deliberations on July 8 and July 9.[8] This was a matter wholly internal to the

(footnote continued)

the assessment of taxes under the Act without reasonable or rational basis. The federal claim alleges a disenfranchisement of New York legislators by the use of the fast roll call in enacting Assembly No. 9059.

[8]The Appellate Division remarked:

> In their brief, the plaintiffs admit that the "fast" roll call "is an expeditious way of handling the volume of legislation that comes before the Senate." On oral argument of the appeals, the plaintiffs conceded that on these facts, *so far as the "fast" roll call is concerned,* the recording of Senator

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legislature and not subject to judicial review. The constitutional claims raised here for the first time challenge under the guaranty clause the use of the fast roll call generally and under the equal protection and due process clauses the use of the fast roll call for Assembly No. 9059. Because they do not complain only of the erroneous recording of a single roll call but rather raise the constitutionality of a legislative procedure, they are not susceptible to dismissal by reference to N.Y.Legis.Law § 40. Without question, the New York courts have undertaken judicial review to

(footnote continued)

> Nolan's vote as affirmative was not constitutionally impermissible. Accordingly, the issue of whether a "fast" roll call violates the mandate of the Constitution is not before us and we express no view as to whether the Senate rules and custom as embodied in the use of the "fast" roll call voting procedure conforms to the constitutional prescription.

89 A.D.2d at 148. The Court of Appeals' opinion, less lucid by its brevity, noted that plaintiffs sought merely a declaratory judgment that "the roll call vote taken upon proposition designated as A9059 . . . was not correctly registerd by the Clerk of the Senate."

Heimbach, through his attorney's letter of October 17, 1983 to this court, avers:

> I think it is quite clear from a reading of all the briefs, which were left with you at the time of oral argument, that the essence of the action at the State court in *Heimbach v. State* was a claim under the New York State Constitution that the bill in question did not receive the "assent" of a majority of the New York State Senators as required by Article III, Section 14 of the New York State Constitution.

Having read through the briefs, the court finds that the constitutional argument was raised to challenge only the single roll call recording. While there is passing mention of a possible constitutional infirmity with the fast roll call generally, *see* Brief of Plaintiffs-Respondents-Appellants before Appellate Division at 43-46; Appellant's Brief before Court of Appeals at 22-24, the two courts clearly took the narrower view of the case. This court will defer to that decision, particularly in light of the narrowness of the third cause of action as stated in the state court complaint.

determine whether legislative procedures comply with constitutional prescriptions. *See e.g., Board of Education v. City of New York,* 41 N.Y.2d 535, 538, 394 N.Y.S.2d 148, 151-52 (Ct.App. 1977); *Schneider v. Rockefeller,* 31 N.Y.2d 420, 434, 340 N.Y.S.2d 889, 900-01 (Ct.App. 1972); *Norwich v. Rockefeller,* 70 Misc.2d 923, 334 N.Y.S.2d 571 (Sp.Ct. 1972), *aff'd,* 338 N.Y.S.2d 384 (1st Dep't 1972), *aff'd,* 33 N.Y.2d 537, 347 N.Y.S.2d 435 (Ct.App. 1973).

Although a state court may decide that the specific legislative procedure employed here was not violative of any constitutional mandates, the state remedy is not rendered inadequate for Tax Injunction Act purposes simply because the claimant would not likely succeed on the merits in the state forum. *Cities Serv. Gas Co. v. Oklahoma Tax Comm'n,* 656 F.2d 584, 586 (10th Cir. 1981), *cert. denied,* 454 U.S. 1124 (1981); *Huber Pontiac, Inc. v. Whitler,* 585 F.2d 817, 821 (7th Cir. 1978). Nothing said by the courts in the state proceeding suggested that they would find a federal constitutional challenge to the fast roll call nonjusticiable.

Even if they would so find, the court does not believe that such a finding renders a state court remedy inadequate for Tax Injunction Act purposes. The limitation on the jurisdiction of a federal court embodied in political question doctrine is coextensive in the same setting with that on a state court. Whether the guaranty, equal protection, or due process clause claims creep into the realm of political questions is an issue for any court, state or federal, called upon to decide the claims. There is no reason to believe that the results would be different in the different forums and given the policies underlying the Tax Injunction Act, this argues for its application. Under the authority of § 1341 and under the prevailing circumstances, plaintiff is not entitled to a federal forum to press his federal constitutional claims. *See Rosewell, supra.*

While the discussion just completed disposes of Heimbach's equal protection and due process causes of action, it does not fully settle the guaranty clause claim. Although it is doubtful that Heimbach seeks to challenge the fast roll call in the abstract, it is possible to view his first cause of action as an attempt to invalidate the fast roll call procedure independent of the passage of Assembly No. 9059. Viewed as such, the first cause of action is not an attempt to enjoin, suspend, or restrain the assessment, levy or collection of a tax, and does not, therefore, run afoul of the Tax Injunction Act. *See Parker v. Merlino,* 646 F.2d 848, 853 n.11 (3d Cir. 1981) ("Even assuming that the Tax Injunction Act deprives the district court of jurisdiction over so much of the complaint as requests a declaration that A-3677 is unconstitutional, an issue that is far from clear, it would not deprive the court of jurisdiction to address plaintiffs' principal claims [on the constitutionality of Senate Rules].").

The court must, therefore, determine whether plaintiff's claim under the guaranty clause, article IV, section 4, presents a justiciable claim. It does not. Chu relies on *Luther v. Borden,* 48 U.S. (7 How.) 1 (1849) for the proposition that controversies arising under the guaranty clause are nonjusticiable. In *Luther,* a trespass action arising out of the Dorr Rebellion in Rhode Island, the defendants sought to justify their breaking into the plaintiff's home by arguing that they had acted under the authority of the "charter government" during martial law to arrest plaintiff as an insurgent against the state. The plaintiff claimed that the charter government was illegal and under the guaranty clause asserted the validity of the "voluntary government." *Id.* at 37, 38. The Court, in an opinion by Chief Justice Taney, rejected plaintiff's claim and held that under the guaranty clause, "it rests with Congress to decide what government is the established one in a State." *Id.* at 42.

While the unique context of *Luther*, armed insurrection against a state government, might have limited its precedential value, *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), affirmed the *Luther* reading of the guaranty clause. There an Oregon corporation challenged the assessment of a tax against it on the basis that the initiative mechanism by which the tax was enacted was "pure democracy" and "subversive" to the principles of a republican form of government. *Id.* at 138, 139. Making a distinction between "judicial authority over justiciable controversies and legislative power as to purely political questions," *id.* at 149, 150, the Court dismissed the action as representative of the latter:

> . . . [That the attack on the statute is] essentially political [in] nature is at once made manifest by understanding that the assault which the contention here advanced makes it [*sic*] not on the tax as a tax, but on the State as a state. It is addressed to the framework and political character of the government by which the statute levying the tax was passed.
>
> * * *
>
> As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction. . . .

Id. at 150, 151.

The Court's decisions in *Luther* and *Pacific States* were subsequently interpreted as placing all guaranty clause challenges to state actions beyond judicial review and

solely in the hands of Congress.[9] *See, e.g., Highland Farms Dairy, Inc. v. Agnew,* 300 U.S. 608, 612 (1937)(even if Virginia Milk and Cream Act had denied a republican form of government, such claim would not be justiciable); *Mountain Timber Co. v. Washington,* 243 U.S. 219, 234 (1917) (whether Washington Workmen's Compensation Act violates guaranty clause is question for Congress not the courts); *Ohio ex rel. Davis v. Hildbrant,* 241 U.S. 565, 569 (1916) (insofar as suit challenges state referendum machinery as unrepublican, it is not justiciable); *Kiernan v. Portland,* 223 U.S. 151, 164 (1912) (challenges to municipal charter amendment permitting sale of bonds held nonjusticiable). This interpretation culminated in Justice Frankfurter's statement that "violation of the great guaranty of a republican form of government in the States cannot be challenged in the courts." *Colegrove v. Green,* 328 U.S. 549, 556 (1946).

The notion that all claims under the guaranty clause are nonjusticiable, however, was rejected in *Baker v. Carr,* 369 U.S. 186 (1962).[10] Writing for the majority, Justice Brennan stated:

> The doctrine of [nonjusticiability] . . . is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona

[9] In two early cases the Court did reach the merits of the guaranty clause claims. *See Minor v. Happersett,* 88 U.S. (21 Wall.) 162 (1875) (rejecting an argument that denial of the vote to women was incompatible with republican government); *In re Duncan,* 139 U.S. 449 (1891) (rejecting a convicted murderer's challenge to his conviction and death sentence on grounds of irregularities in the state legislature's enactment of applicable statutues). Even in *Luther* itself, the Court reached the question of whether the charter government's actions were unrepublican. *Luther v. Borden,* 48 U.S. (7 How.) 1, 45 (1849). *See also* Note, *A Niche for the Guarantee Clause,* 94 Harv.L. Rev. 681, 684-85 (1981).

[10] *See also Reynolds v. Sims,* 377 U.S. 533, 582 (1964) ("As we stated in *Baker v. Carr,* some questions raised under the Guaranty Clause are nonjusticiable where 'political' in nature and where there is a clear absence of judicially manageable standards.").

> fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.

Id. at 217. Nevertheless, the Court in reaching the landmark reapportionment decision, ultimately relied on the equal protection clause with its more familiar judicially enforceable rights rather than risk a frontal attack on what had come to be viewed as Congressional prerogative.

While ambiguities remain with regard to the justiciability of political questions, after *Baker,* the courts have authority to restructure state government when necessary to vindicate individual rights. The author of a recent law review note agrees that this is an appropriate role for the judiciary, particularly in defense of those "individuals who are least likely to have a potent voice in the political process." He cautions, however, against judicial involvement beyond that which is necessary to safeguard threatened individual rights. He concludes: "Indeed, if a basic principle of republicanism is that decisions most directly affecting a body of people be made by the people themselves, the guarantee clause itself argues against the imposition by a federal court of its own governmental values." Note, *A. Niche, for the Guarantee Clause,* 94 Harv.L. Rev. 681, 689 (1981).

Here the threat posed by the so-called "fast roll call" is an abstract one dealing with what are essentially internal state legislative procedures and customs. Moreover, this court has serious doubts as to Heimbach's standing to challenge the fast roll call procedure. Without an anchor to the lawsuit in a grievance over a specific enactment, barred as indicated above, Heimbach's injury becomes abstract and his interest undifferentiated from that which

is held in common by all members of the New York public. *See Ex Parte Levitt,* 302 U.S. 633, 634 (1937) (*per curiam*) (citizen challenged appointment of Justice Black as a violation of the ineligibility clause, article I, section 6, clause 2 of the United States Constitution). An adverse effect on the generalized interest of citizens in constitutional governance does not create standing. *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 225 (1974) (an association of present and former officers and enlisted members of the Armed Forces Reserves opposing U. S. involvement in Vietnam brought class action challenging Reserve membership of Congressmen as violative of the incompatability clause, article 1, section 6, clause 2 of the United States Constitution); *United States v. Richardson,* 418 U.S. 166, 176-80 (1974) (taxpayer brought suit to obtain declaration of unconstitutionality of statute permitting CIA to account for its expenditures solely on the certificate of the Director). Further, there is an insufficient showing here of denial of any Constitutional guaranty.

For the reasons stated above, the motion to dismiss is granted.

It is so ordered.

Dated: New York, N. Y.
December 23, 1983

ROBERT W. SWEET
U.S.D.J.

Opinion of United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 1193—August Term, 1983

(Argued May 11, 1984 Decided September 17, 1984)

Docket No. 84-7067

LOUIS HEIMBACH, as County Executive of Orange County on behalf of himself and all those similarly situated in the Metropolitan Transportation District of the State of New York,

Plaintiff-Appellant,

—v.—

RODERICK CHU, as Commissioner of New York State Department of Taxation and Finance, and WARREN ANDERSON, as Temporary President of the New York State Senate,

Defendants-Appellees.

Before:

OAKES, VAN GRAAFEILAND, *Circuit Judges*, and BONSAL, *District Judge.**

* Of the United States District Court for Southern District of New York, sitting by designation.

Appeal from an order and judgment of the United States District Court for the Southern District of New York (Sweet, J.) dismissing plaintiff's complaint, which challenged on constitutional grounds the "fast roll call" procedure of the New York State Senate and tax legislation enacted using this procedure.

Affirmed.

JAMES G. SWEENEY, County Attorney, Orange County Government Center, Goshen, N.Y., *for Plaintiff-Appellant*

AVEN RENNIE, Assistant Attorney General, New York, N.Y. (Robert Abrams, Att'y Gen. of the State of New York, Melvyn Leventhal, Deputy First Ass't Att'y Gen., and Richard G. Liskov, Ass't Att'y Gen., New York, N.Y., of Counsel), *for Defendants-Appellees*

VAN GRAAFEILAND, *Circuit Judge*:

This is an appeal from an order and judgment of the United States District Court for the Southern District of New York (Sweet, J.) dismissing appellant's complaint on motion. The complaint asked for declaratory and injunctive relief based on allegations that the New York Senate's procedure for a "fast roll call" vote violated the Guarantee Clause of article IV, section 4, of the United States Constitution, and, as used in enacting a sales and use tax

in the twelve counties served by the Metropolitan Transportation Authority, denied appellant equal protection and due process of law. We affirm.

Rule VIII, section 6 of the New York Senate's Rules of Procedure provides for the passage of bills by "a roll call . . . of five Senators, two of whom shall be the Temporary President and the Minority Leader, provided however, that each Senator's name shall be called if requested by five Senators." According to Senate custom, each Senator who is not called in the fast roll call is deemed to have voted in favor of the bill unless he voices opposition to the bill or is considered absent at the time of the vote. Physical absence from the Senate chambers, however, will not prevent a Senator from being considered "present" for purposes of the fast roll call if he was in attendance prior to the call and had not asked the Secretary of the Senate to be excused. Of all the bills passed in 1981, 97.9% were passed by fast roll call. *Heimbach v. State of New York*, 89 A.D.2d 138, 143 (1982) (per curiam).

On July 8, 1981, Senator Howard Nolan participated in Senate proceedings until late in the afternoon. Senator Manfred Ohrenstein, the Minority Leader, telephoned Senator Nolan after he left to tell him that the Senate was going to consider a financing package for the Metropolitan Transportation Authority. Senator Nolan told Senator Ohrenstein that he opposed the package but that he would not be returning to the Senate chambers because he was scheduled to undergo surgery the following morning. There is a dispute as to whether Senator Nolan asked Senator Ohrenstein to arrange to have him excused from the proceedings. In any event, this was not done. Senator Nolan was in the hospital when the Senate, by fast roll call, passed the bill now being challenged, Assembly No. 9059, 1981 N.Y. Laws ch. 485, codified at N.Y. Tax Law

§ 1109. The bill received 31 affirmative votes, the minimum needed for passage, and Senator Nolan was counted as favoring the bill.

On September 17, 1981, appellant brought a class action in New York Supreme Court, Orange County, alleging that section 1109 violated the equal protection rights of taxpayers in Orange and Suffolk counties and that it had not been duly enacted because Senator Nolan opposed the bill and his vote should not have been counted in favor of it. The court, without considering the equal protection claim, declared the statute invalid because it had not received the "assent of a majority of the members elected to each branch of the legislature" as required by article III, section 14, of the New York State Constitution. *Heimbach v. State of New York,* 113 Misc.2d 189 (1982). The Appellate Division, Second Department, reversed. 89 A.D.2d 138. Because appellant conceded in that court that the fast roll call procedure did not violate the State constitution, the court limited its consideration of the disputed roll call to whether Senator Ohrenstein had wrongfully neglected to have Senator Nolan marked "excused". The court refused to intervene in the internal affairs of the Legislature by resolving this dispute. *Id.* at 148-49.The Court of Appeals followed the same tack, citing N.Y. Legis. Law § 40 as authority for the proposition that "the presiding officer's certificate showing the date and requisite votes for passage of a bill shall be 'conclusive evidence' that the bill was validly enacted." 59 N.Y.2d 891, 892, *appeal dismissed,* 104 S. Ct. 386 (1983).

Appellant then sought a district court judgment declaring that rule VIII, subdivision 6, when combined with the Senate custom which presumes affirmative votes by all "present" Senators, violates the Guarantee Clause of

the United States Constitution. Appellant also asked the district court to invalidate section 1109 on the ground that the manner in which it was passed violated the equal protection and due process clauses of the Constitution. The district court dismissed appellant's equal protection and due process claims as improper attempts to challenge a State tax in the federal courts. *See* 28 U.S.C. § 1341. It dismissed the Guarantee Clause claim on the grounds that it was not justiciable and appellant's injury was too abstract to create the standing necessary for bringing suit.

The district court's opinion was handed down prior to *Migra v. Warren City School District Board of Education*, 104 S. Ct. 892 (1984), in which the Supreme Court held that a State court judgment in a section 1983 civil rights action had the same preclusive effect in federal court that it would have had in the State courts. Although appellees in the instant case advanced the defense of *res judicata* in the district court, the court did not rely on that doctrine in dismissing the complaint. This, however, does not preclude us from affirming the district court's judgment on the basis of *res judicata*, if, in fact, *res judicata* is a valid defense. *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937). On the teachings of *Migra*, *supra*, we believe that it is.

New York has adopted the transactional identity approach to *res judicata*, under which a claim that could have been asserted under a given set of facts in a concluded action is barred from being asserted under the same set of facts in a subsequent action. *See Reilly v. Reid*, 45 N.Y.2d 24, 27-31 (1978). Application of this doctrine assumes, of course, that the court in which the first action was brought would have been willing and able to consider the theory that is being advanced in the second action. *See Salwen Paper Co., Profit Sharing*

Retirement Trust v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 72 A.D.2d 385, 391 (1980). Whether it is proper to make that assumption in the instant case depends upon the arguments presented to the New York Court of Appeals and that Court's rulings with respect to those arguments, matters concerning which the briefs in this Court unfortunately are obscure.

Our own review of the State record reveals, however, that the federal constitutional claims relating to the fast roll call never were presented to the New York Court of Appeals. Indeed, appellant did not challenge the fast roll call per se, but only its use in Senator Nolan's "unexcused" absence. Moreover, that challenge was based on article III, section 14 of the New York Constitution, which prohibits the passage of a bill "except by the assent of a majority of the members elected to each branch of the legislature." The Court of Appeals did not, as appellant contends, declare that it did "not have jurisdiction to entertain claims aimed at the number of votes cast or the number of Senators present", nor did it say that it "could not and would not have entertained . . . [a] Federal Constitutional claim aimed at the number of votes cast or the number of senators present . . . ." It simply refused to intrude into the wholly internal affairs of the Legislature. 59 N.Y.2d at 893.

Legislative proceedings which violate the United States Constitution are not "wholly internal" legislative affairs. *See Powell v. McCormack*, 395 U.S. 486 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966). New York judges and legislators are bound by oath or affirmation to support the Constitution of the United States, U.S. Const. art. VI, cl. 3, and State courts are under the same duty as federal courts to respect rights arising thereunder. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Brown v. Allen*, 344 U.S.

443, 499 (1953); *Testa v. Katt*, 330 U.S. 386, 390-91 (1947). The New York Court of Appeals has made it clear that it will not shrink from the adjudication of legal issues simply because a case has political overtones. *See Anderson v. Krupsak*, 40 N.Y.2d 397, 402-04 (1976). Although that Court is reluctant to interfere with the internal procedures of the Legislature, it has stated flatly that "judicial review may be undertaken to determine whether the Legislature has complied with constitutional prescriptions as to legislative procedures." *Board of Education v. City of New York*, 41 N.Y.2d 535, 538 (1977).

Appellant's reliance upon the preclusive effect of New York Legislative Law § 40 is misplaced. Section 40 requires the presiding officer of the New York Senate to certify the date of each bill's passage "and whether [it was] passed by the votes of a majority of all [Senators] or of two-thirds thereof, or of a majority of [the Senators], three-fifths thereof being present." It then provides that "[n]o bills shall be deemed to have so passed unless certified in the manner provided by this section, which certificate to such effect shall be conclusive evidence thereof."

Although section 40 limits judicial review of some alleged deficiencies in legislative proceedings, as it did on appellant's appeal to the New York Court of Appeals, 59 N.Y.2d at 892-93, section 40 is conclusive evidence only as to the matters certified by the presiding officer. He certifies that the bill "so passed". He does not certify that the method of passage met the requirements of the United States Constitution. *See Franklin National Bank v. Clark*, 26 Misc.2d 724, 745 (1961).

Assuming for the argument only that New York courts would be precluded by New York Legislative Law § 40 from passing upon appellant's challenge to section 1109,

there is nothing in section 40 that would prevent the courts from banning the use of fast roll calls in future legislative enactments where no section 40 certification as yet has been made.

Whether the New York Court of Appeals would have found merit in appellant's constitutional arguments is a question we need not decide. For *res judicata* purposes, we are interested only in whether argument on the merits would have been heard. Despite the provisions of section 40, we are satisfied that it would have been. *See Board of Education v. City of New York*, *supra*, 41 N.Y.2d at 538; *Anderson v. Krupsak*, *supra*, 40 N.Y.2d at 402-04.

Because of the availability of a State court remedy, the district court correctly held that appellant was precluded by the terms of the Tax Injunction Act, 28 U.S.C. § 1341, from challenging section 1109 of the New York Tax Law. Section 1341 reads:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Appellant contends that his claim is not within the Act because its primary challenge is to the legislative procedure rather than the resultant tax. *See Parker v. Merlino*, 493 F. Supp. 381, 386 (D.N.J. 1980), *aff'd*, 646 F.2d 848, 852-53 n.11 (3d Cir. 1981). This argument is not persuasive.

The Tax Injunction Act, with "its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations," *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976), "limit[s] drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes," *Rosewell v. LaSalle National Bank*, 450

U.S. 503, 522 (1981). Even if the plea for federal court review rests on constitutional grounds and asks only for declaratory relief, the Act deprives the district courts of jurisdiction to interfere with the State tax. *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982). This jurisdictional limitation, focusing on whether the district court has been asked to "enjoin, suspend or restrain" a State tax, should not depend for its application on the nature of the challenge to the tax, whether it be to the provisions of the taxing statute or to the manner in which the statute was enacted. To the extent that *Parker v. Merlino*, *supra*, is to the contrary, we decline to follow its reasoning.

We need spend little time on appellant's argument that the district court should have considered his challenge to the fast roll call procedure, separate and apart from its use in enacting section 1109. The district court held this claim to be nonjusticiable and appellant without standing to pursue it. *See Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974); *United States v. Richardson*, 418 U.S. 166, 179-80 (1974). If, as appellant contends, his generalized and abstract challenge to the constitutionality of the fast roll call is justiciable and he has standing to pursue it, appellant should have made the same challenge in his State court action. As pointed out above, New York Legislative Law § 40 is applicable only where section 40 certifications have been made. If appellant's contentions are correct, the arguments which he would make in the instant action could have been made in the State court. The doctrine of *res judicata* precludes piece-meal attacks such as are being attempted here.

For all the reasons above-expressed, we conclude that the district court's judgment was correct. It therefore is affirmed.

Court of Appeals Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

#84-7067

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of September one thousand nine hundred and eighty-four.

Present:

Hon. James L. Oaks,
Hon. Ellsworth A. Van Graafeiland,
Circuit Judges.
Hon. Dudley B. Bonsal,
District Judge,
sitting by designation.

LOUIS HEIMBACH, as County Executive of Orange County on behalf of himself and all those similarly situated in the Metropolitan Transportation District of the State of New York,

Plaintiff-Appellant,

v.

RODERICK CHU, as Commissioner of New York State Department of Taxation and Finance, and WARREN ANDERSON, as Temporary President of the New York State Senate,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District Court of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellees.

ELAINE B. GOLDSMITH, Clerk

Opinion of New York State Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

LOUIS HEIMBACH, *et al.*,

Appellants,

v.

THE STATE OF NEW YORK, *et al.*,

Respondents,

WARREN M. ANDERSON, as Temporary President &c. of the New York State Senate,

Intervenor-Respondent.

Memorandum.

The order of the Appellate Division should be affirmed, with costs.

Plaintiffs commenced this action seeking a declaratory judgment that (1) "the roll call vote taken upon proposition designated as A9059 * * * was not correctly registered by the Clerk of the Senate"; and (2) that Chapter 485 of

the Laws of 1981 (Tax Law, §1109) is violative of the Equal Protection Clause of the Fourteenth Amendment.

Section 40 of the Legislative Law provides that the presiding officer's certificate showing the date and requisite votes for passage of a bill shall be "conclusive evidence" that the bill was validly enacted. The statute, therefore, precludes judicial review of the propriety of the subject roll call vote to effect legislative action. In any event, based upon our respect for the basic polity of separation of powers and the proper exercise of judicial restraint, we will not intrude into the wholly internal affairs of the Legislature. (See *Board of Educ. v. City of New York*, 41 NY2d 535, 538; *Matter of Anderson v. Krupsak*, 40 NY2d 397, 403.) "[I]t is not the province of the courts to direct the legislature how to do its work." (*N Y Public Interest Group, Inc. v. Steingut*, 40 NY2d 250, 257.)

Plaintiffs contend in the alternative that if the subject taxing statute were validly enacted, it is nonetheless violative of the Equal Protection Clause of the Fourteenth Amendment because it has a disparate effect on certain regions of the Metropolitan Commuter Transportation District. While it may be true that the statute has resulted in some such disparate treatment, it is undisputed that the residents of Suffolk and Orange Counties use MTA services which are available in those counties and which are subsidized, either directly or indirectly, by revenues generated by the subject tax. As such, the statute has a rational basis and must be upheld. Even a "flagrant unevenness" in application of the tax will not prevent the statute from passing constitutional muster. (*Matter of Long Island Lighting Co. v. State Tax Comm.*, 45 NY2d 529, 535.)

Order affirmed, with costs, in a memorandum. Chief Cooke and Judges Jasen, Jones, Wachtler, Meyer and Simons concur.

Decided June 16, 1983

Constitutional and Statutory Provisions.

The Constitution of the United States of America

ARTICLE IV.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The Constitution of the United States of America.

AMENDMENT 14.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution, Art. III.

§14. [Manner of passing bills; majority message of necessity for immediate vote].

No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting

governor, shall have certified, under his hand and seal of the state, the facts which in his opinion necessitate an immediate vote thereon, in which case it must nevertheless be upon the desks of the members in final form, not necessarily printed, before its final passage; nor shall any bill be passed or become a law, except by assent of a majority of the members elected to each branch of the legislature; and upon the last reading of a bill, no amendment thereof shall be allowed, and the question upon its final passage shall be taken immediately thereafter, and the ayes and nays entered on the journal.

New York Legislative Law.

§ 40. Certificate of presiding officer

Upon the passage by either house of the legislature of a bill, concurrent resolution proposing amendments to the state constitution, or concurrent resolution proposing or ratifying amendments to the constitution of the United States, the presiding or other officer designated by the rules of such house shall append to such bill or resolution a certificate, to be signed by him, which shall disclose the date of its passage in such house, and whether passed by the votes of a majority of all the members elected to such house or of two-thirds thereof, or of a majority of such members, three-fifths thereof being present. In addition, if any such bill has been passed on a message required by the constitution, that fact also shall be stated, and if the message so specifies, the applicable portion of the constitution shall be identified. Upon the passage of a bill as to which a part becomes law immediately and a part requires further action by the governor, two copies shall be certified as above provided, one of which, upon final passage by both houses, shall be transmitted to the governor and the other to the secretary of state. No bills shall be deemed to have so passed unless certified in the manner provided by this section, which certificate to such effect shall be conclusive evidence thereof

New York Senate Rule VIII.

Section 6. Final Passage.

The question on the final passage of every bill shall be taken immediately after the third reading and without debate. On the final passage of every bill, a roll call shall be taken by the Secretary calling the names of five Senators, two of whom shall be the Temporary President and the Minority Leader, provided however, that each Senator's name shall be called if requested by five Senators. Each roll call shall be entered on the journal. Such roll calls shall be available for public inspection upon request in the office of the Journal Clerk. When a bill does not receive the number of votes required by the Constitution to pass it, it shall be declared lost, except in cases provided for by subdivision d of section two of Rule 9 hereof.

New York Senate Rule IX.

Section 1. Attendance and Vote.

a. Every Senator shall be present within the Senate Chamber during the sessions of the Senate, unless duly excused or necessarily prevented, and shall vote on each question stated from the Chair unless excused by the Senate, or unless he has a direct personal or pecuniary interest in the event of such question. If any Senator refuses to vote, unless he be excused by the Senate, or unless he be interested, such refusal shall be deemed a contempt. No vote of a Senator shall be recorded on a bill on the controversial calendar unless the Senator shall vote from his regularly assigned seat, except that a Senator acting as the Presiding Officer, Majority Leader or Minority Leader may vote from the place assigned to such officer.

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FILED
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CLERK

No. 84-944

IN THE

Supreme Court of the United States

October Term, 1984

LOUIS HEIMBACH, as County Executive of Orange County on behalf of himself and all those similarly situated in the Metropolitan Transportation District of the State of New York,

Petitioner,

against

RODERICK CHU, as Commissioner of the New York State Department of Taxation and Finance, and WARREN ANDERSON, as Temporary President of the New York State Senate,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Did the Court of Appeals for the Second Circuit hold correctly that petitioner's claims were barred as *res judicata* under New York law, and that the preclusive effect of a prior state court judgment was entitled to full faith and credit under *Migra* v. *Warren City School District Board of Education*, —— U.S. ——, 104 S. Ct. 892 (1984)?

2. Did the Court of Appeals also hold correctly that the Tax Injunction Act, 28 U.S.C. § 1341, bars any federal action to enjoin the collection of a state tax, regardless of whether the action challenges the method of enactment of a state tax statute or its substantive provisions?

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No. 84-944

IN THE

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October Term, 1984

LOUIS HEIMBACH, as County Executive of Orange County on behalf of himself and all those similarly situated in the Metropolitan Transportation District of the State of New York,

Petitioner,

against

RODERICK CHU, as Commissioner of the New York State Department of Taxation and Finance, and WARREN ANDERSON, as Temporary President of the New York State Senate,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

As set out more fully in the decision of the Second Circuit, this case involves a challenge to the so-called "fast roll call" voting procedure used in the New York State Senate (Petition Appendix pp. 21a-24a, "Pet. App."). After challenging a sales and use tax enacted under this procedure in the state courts, with respect to which this Court dismissed an appeal for want of a substantial question, *Heimbach* v. *State,* —— U.S. ——, 104 S. Ct. 386 (1983), petitioner then sought a district court judgment de-

claring that the State Senate's voting procedure violated the Guaranty Clause of the United States Constitution and that a tax provision, N.Y. Tax Law § 1109 ("Section 1109"), enacted by this voting procedure, was invalid because the manner in which it was passed violated the equal protection and due process clauses of the United States Constitution. The court below affirmed dismissal of the complaint (Pet. App. pp. 23a-24a).

Respondents rely on the facts as set forth in the decision of the Second Circuit (Pet. App. pp. 21a-24a). We note, in addition, that the method by which State Senator Howard Nolan allegedly attempted to have himself marked absent from the Senate Chamber, and therefore not counted as voting on any fast roll call or traditional roll call vote, was an informal procedure for noting an absence (A. 126*). The formal method, as prescribed by Senate Rule IX, § 1(a),** was for the Senator to rise and request that the clerk mark him absent upon the assent of a majority of the Senate, before the Senator left the Chamber (A. 126). It is undisputed that Senator Nolan failed to follow this formal procedure (A. 42-43, A. 126). His telephone call to the Senate Minority Leader, in which he allegedly requested that his absence from the Chamber be noted, was an informal request not guaranteed to result in an excused absence (A. 126).

The prior state court proceedings are described in the Second Circuit's decision (Pet. App. p. 23a), in the District Court's decision (Pet. App. pp. 5a-7a) and in the Petition

* References preceded by "A" are to the appendix filed in the New York Court of Appeals. The appendix was filed with the District Court and was certified as part of the record in the Second Circuit. Respondents will provide the appendix if petitioner disputes any of the established facts in his reply brief.

** Pertinent portions of the Senate Rules are reproduced in the appendix to this brief, and in the appendix to the Petition.

at pages 5-7. Respondent emphasizes that the three claims alleged in the federal court complaint, for the dismissal of which petitioner seeks this Court's review, were never raised or decided in the prior state court proceedings, although they could have been raised and decided there (Second Circuit decision, Pet. App. p. 25a).

Indeed, petitioner conceded in the Appellate Division that the fast roll call, used to record Senator Nolan as voting in favor of the challenged tax measure, Section 1109, notwithstanding his absence from the Chamber, did not violate the United States Constitution. *Heimbach* v. *State*, 89 A.D.2d. 138, 148 (2d Dept. 1982) (*per curiam*).

In the state's highest court, petitioner also did not argue that the use of the fast roll call procedure violated the United States Constitution (Second Circuit decision, Pet. App. p. 25a, District Court decision, Pet. App. pp. 12a-13a, Verified Complaint filed in the Supreme Court of the State of New York, Orange County, A. 9-23). He limited his challenge to arguments based on the New York State Constitution, Art. III, § 14, Senate Rules VIII, § 6, IX, §§ 1(a), 2(a), 7, and Legislative Law § 40.

ARGUMENT

I.

The Petition Presents No Special or Important Reason for Granting the Writ.

Petitioner's three claims could have been raised and determined in a prior state court action, but were not. Hence, as held below, they are now barred by the doctrine of *res judicata* (*infra*, p. 5). The claims are also barred

by the Tax Injunction Act (*infra*, p. 7), or, to the extent not barred, are not justiciable or presented by a petitioner with requisite standing (Second Circuit decision, Pet. App. p. 28a).

Even if petitioner's claims are not barred, this Court has consistently held that the Guaranty Clause of the United States Constitution, Art. IV, Sec. 4, is enforceable only by Congress. *Highland Farm Dairy* v. *Agnew*, 300 U.S. 608, 612 (1937); *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U.S. 118, 151 (1912); *Luther* v. *Borden*, 48 U.S. 142 (1849). Nor is the Clause offended by the rule of convenience that permits a New York State Senator to be recorded as voting in favor of a measure despite his absence from the Senate Chamber. A Senator who must leave the Senate Chamber before casting his vote may signal his affirmance of all measures taken up by fast roll call by leaving the Chamber without having himself marked absent (A. 123-25). Conversely, a Senator who does not wish to be recorded as favoring a measure may rise and ask that the clerk note his absence before the Senator leaves the Chamber. (*Id.*) Thus, Senator Nolan had only to follow Senate Rule IX, § 1(a) to avert the error alleged by petitioner—an unintended aye vote recorded in favor of Section 1109 by the clerk for an absent Senator.

Finally, the corruption envisioned by petitioner at p. 7 of the Petition, in which the five Senators whose names are called on a fast roll call conspire to enact legislation in a deserted Senate Chamber, cannot occur. A quorum is required to enact any legislation, and any of the five Senators whose names are called on a fast roll call, including the

Minority Leader, may expose the non-existence of a quorum under Senate Rule IX, § 2(f), or that lack of a quorum may be noted by the clerk *sua sponte* under Senate Rule IX, § 2(d).

II.

The Second Circuit Correctly Held that the Action Was Barred by *Res Judicata*.

This Court's decision in *Migra* v. *Warren City School District Board of Education*, —— U.S. ——, 104 S. Ct. 892 (1984), was announced after the District Court dismissed the complaint on statutory grounds (*infra*, p. 7). The defense based on the doctrine of *res judicata* was raised in the District Court and preserved for consideration by the Second Circuit (Pet. App. p. 24a), which affirmed the dismissal on the basis of *Migra* v. *Warren City*, as well as the grounds relied on by the District Court.

The Second Circuit correctly found that the constitutional claims raised in the complaint would have been heard and decided by the state's highest court had those claims been raised. The New York Court of Appeals has unequivocally demonstrated its willingness to address challenges to legislative procedures on constitutional grounds. *See Board of Education* v. *City of New York*, 41 N.Y.2d 535, 538 (1977); *Anderson* v. *Krupsak*, 40 N.Y.2d 397, 402-04 (1976); *N.Y. Public Interest Research Group* v. *Steingut*, 40 N.Y.2d 250 (1976); *Schneider* v. *Rockefeller*, 31 N.Y.2d 420, 434 (1972); *see also, Norwick* v. *Rockefeller*, 70 Misc. 2d 923, *aff'd*, 40 A.D.2d 956 (1st Dept. 1972).

Petitioner's federal constitutional claims were not before the New York Court of Appeals when it ruled that it would not entertain petitioner's challenge to Section 1109 because the statute had been certified as having been passed by the correct number of votes under N.Y. Legislative Law § 40.* The Second Circuit correctly pointed out that "section 40 is conclusive evidence only as to matters certified by the presiding officer. He certifies that the bill 'so passed.' He does not certify that the method of passage met the requirements of the United States Constitution. *See Franklin National Bank* v. *Clark*, 26 Misc. 2d 724, 745 (1961)" (Pet. App. p. 26a). Thus, the lower court correctly held that petitioner's federal constitutional claims would have been heard in the state courts had those claims been presented there.

The decision of the New York Court of Appeals was entitled to the same *res judicata* effect in the District Court as it would have had in the state courts. Since the state courts would have precluded claims that were or could have been raised in the prior proceeding, under a transactional identity approach to *res judicata*, *Reilly* v. *Reid*, 45 NY2d 24, 27-31 (1978); Restatement of Judgments 2d, § 25d (comment e, p. 213), the Second Circuit correctly concluded in keeping with *Migra* v. *Warren City* that dismissal was warranted.

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* Petitioner's federal claims were not raised in the prior state court action. *See* discussion of state court action, *supra*, p. 2-3. The federal equal protection challenge to the substantive provisions of Tax Law § 1109, as opposed to the method of its enactment, was separately considered by the State's highest court and rejected (Pet. App. p. 32a). This Court dismissed petitioner's appeal for want of a substantial federal question. ——U.S. ——, 104 S. Ct. 386 (1983).

III.

The Second Circuit Correctly Held that the Action Was Barred by the Tax Injunction Act.

Although it was not necessary for the Second Circuit to consider an alternative ground for dismissal, it did so in affirming the lower court's finding that two of petitioner's three claims were barred by the Tax Injunction Act, 28 U.S.C. § 1341 (Pet. App. pp. 27a-28a).

Petitioner contended that his claims were not barred by the Act because he challenged the method by which Section 1109 was enacted, not its substantive provisions. The Second Circuit held that the Act bars any action to enjoin collection of a state tax, whether the grounds for invalidation are procedural or substantive. This conclusion was based on sweeping language in recent decisions of this Court "drastically" limiting federal court jurisdiction to enjoin the collection of state taxes. *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 522 (1981); *California* v. *Grace Brethren Church*, 457 U.S. 393, 411-13 (1982).

The petition presents no reason why the limitation of the Tax Injunction Act should not apply. Even if an exception to the Act were recognized for procedural as opposed to substantive challenges to state tax statutes, petitioner would not be entitled to claim that exception. Petitioner's objective since first commencing his various challenges to Section 1109 has been to stop the state from collecting taxes. Petitioner's first action in federal court challenged the substantive provisions of Section 1109 on

federal equal protection grounds, and contained no allegations about its method of enactment (District Court decision, Pet. App. p. 5a). That action was discontinued. Petitioner's state court challenge repeated the substantive challenge on federal equal protection grounds and added claims based on the manner in which the section was enacted, under state constitutional and statutory provisions (Second Circuit decision, Pet. App. p. 23a, District Court decision, Pet. App. pp. 6a-7a, Verified Complaint filed in the Supreme Court of the State of New York, Orange County, A. 9-23). The state court action was dismissed on all grounds (New York Court of Appeals decision, Pet. App. p. 31a).

After this Court dismissed petitioner's appeal from that portion of the decision of the Court of Appeals dismissing his equal protection challenge (104 S. Ct. 386), petitioner filed the complaint that forms the basis of this petition, framing his challenge in procedural terms only. Given the nature of petitioner's past challenges to Section 1109, it is disingenuous for him to claim that his principal objective is not the invalidation of a state tax, but rather the method by which the tax was enacted. Thus, even if the Tax Injunction Act did not bar the District Court from hearing a challenge to the method of enactment of a state tax statute, petitioner could not qualify for such an exception.

IV.

The Claimed Conflict Between the Second and Third Circuits Provides No Basis for Further Review.

The issue that petitioner alleges the Second and Third Circuits are in conflict was not necessary to the decision below. As we have shown, this action was properly dismissed in accordance with *Migra* v. *Warren City School District Board of Education.* There was thus no need for the Second Circuit to address the grounds for dismissal originally relied upon by the District Court, namely, the applicability of the Tax Injunction Act, 28 U.S.C. § 1341 (*supra,* p. 7).

Even if this issue were preserved for review, there is no disagreement between the Second and Third Circuits sufficient to merit review. Petitioner relies on *Parker* v. *Merlino,* 646 F.2d 848, 852-53, n. 11 (3d Cir. 1981), which affirmed a decision refusing to apply the Tax Injunction Act to a complaint that challenged the method of enactment of a state tax statute. The Third Circuit specifically noted its uncertainty about "whether the Act applies to actions for declaratory relief in a case such as this." *Id.* This Court's later decision in *California* v. *Grace Brethren Church,* 457 U.S. at 411, made clear that the Act applied to constitutional challenges seeking declaratory relief. The soundness of the Third Circuit's reasoning in *Parker* v. *Merlino,* is, after *California* v. *Grace Brethren Church,* doubtful. As the Third Circuit would most likely decline to follow its own reasoning in *Parker* v. *Merlino,* the fact that the Second Circuit has also declined to follow its rea-

soning would not create conflict between the Circuits sufficient to grant certiorari even if the issue to which the alleged conflict related had been a necessary part of the decision below.

Conclusion

The Petition for a Writ of Certiorari Should Be Denied.

Dated: New York, New York
February 28, 1985

Respectfully submitted,

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APPENDIX

APPENDIX

New York State Senate Rules of Procedure

Rule IX, § 2. Quorum. a. A majority of all the Senators elected shall constitute a quorum to do business. In case a less number than a quorum of the Senate shall convene, those present are authorized to send the Sergeant at Arms, or any other person, for the absent Senators.

Rule IX, § 2(d). If, on taking the final question on a bill, it shall appear that a constitutional quorum is not present, or if the bill requires a vote of two-thirds of all the Senators elected to pass it, and it appears that such number is not present, the bill shall retain its place on the Calendar and be again taken up in its regular order.

Rule IX, § 2(f). If at any time during the session of the Senate a question shall be raised by any Senator as to the presence of a quorum, the Presiding Officer shall forthwith direct the Secretary to call the roll, and shall announce the result, and such proceeding shall be without debate; but no Senator while speaking shall be interrupted by any other Senator raising the question of a lack of quorum, and the question as to the presence of a quorum shall not be raised oftener than once in every hour unless the lack of quorum shall be disclosed upon a roll call of the ayes and nays.

Rule IX, § 7. Absences. In all cases of absence of Senators during the sessions of the Senate, the Senators present may take such measures as they deem necessary to secure the presence of the absentees, and in addition to suspension for a given period, may inflict such censure or penalty as they may deem just on those who shall not render sufficient excuse for their absence.